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September 25, 1998

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Initial Comments of Intermedia Communications, Inc. – CC Docket No. 98-147

Dear Ms. Salas:

Pursuant to the Notice of Proposed Rulemaking issued in the above-referenced docket, on behalf of Intermedia Communications, Inc.("Intermedia"), I am hereby filing an original and 4 copies of Intermedia's Initial Comments. In addition, I am submitting an electronic copy of this filing on diskette with the Commission in "read only" mode and it has been labeled in accordance with the Commission's instructions.

IMPORTANT: ALTHOUGH WE BELIEVE THE DISKETTES TO BE UNINFECTED, OUR COMPUTER SYSTEM HAS BEEN PLAGUED BY A COMPUTER VIRUS THIS WEEK. THEREFORE, PLEASE HAVE THE DISKETTES SCANNED FOR VIRUSES PRIOR TO UPLOADING THEM TO YOUR SYSTEM.

Enclosed please also find a duplicate of this filing. Please date stamp the duplicate upon receipt and return it in the envelope provided.

Sincerely,

Ross A. Buntrock

DC01/BUNTR/62760.1

ORIGINAL

Intermedia Communications Inc.
CC Docket No. 98-147
September 25, 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Deployment of Wireline Services Offering	)	
Advanced Telecommunications Capability	)	CC Docket No. 98-147

INITIAL COMMENTS OF INTERMEDIA COMMUNICATIONS INC.

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September 25, 1998

SUMMARY

The orders issued by the Commission in the Memorandum Opinion and Order, and the tentative conclusions issued in the Notice of Proposed Rulemaking issued in this proceeding demonstrate a firm command of the nature of today's competitive local markets. Intermedia applauds the Commission for taking this bold step forward in implementing the procompetitive provisions of §§ 251, 252, 271, 272 and 706 of the Communications Act. In these comments Intermedia generally supports the Commission's tentative conclusions, and proposes a number of rules and policies that will dramatically facilitate the development of competitive local telecommunications markets throughout the country.

Intermedia urges the Commission to adopt a broad definition of "advanced telecommunications capabilities" that includes wireless as well as wireline applications. This is necessary to promote optimal competition and to comply with the technology-neutral mandate of the Act.

Intermedia cautiously supports the Commission's proposed rules governing separate ILEC advanced service subsidiaries, although the rules proposed by the Commission need to be expanded and clarified. Most importantly, the Commission cannot limit its scrutiny to "one-way" transactions in which an affiliate purchases from an ILEC. Instead, the Commission must also scrutinize transactions in which an ILEC purchases services, goods or functionalities from its affiliate.

The Commission should adopt standardized, nationally applicable collocation rules that include the most innovative rules and regulations adopted by state regulators. Proceedings in New York and Texas are particularly valuable sources of such "best state practices." In

particular, the Commission should adopt these state policies requiring ILECs to: 1) provide "Enhanced Extended Link" (the functionality of loop, central office multiplexing, and transport); 2) allow collocating CLECs to share physical collocation cages; 3) eliminate any restrictions on collocated CLECs' ability to cross-connect to each other; 4) commit to specific and reasonable provisioning intervals, and liquidated damages if the intervals are missed; and 6) provide "cageless" collocation.

The Commission should also prevent ILECs from imposing restrictions on the types of equipment a CLEC may collocate. While some size restrictions are reasonable, it is particularly important that CLECs not be restricted in collocating equipment that performs switching functions. The Commission should also allow the collocation of equipment necessary to provide Internet Protocol conversion and other enhanced service functions.

Intermedia also proposes reasonable security provisions to govern collocation arrangements, calls for CLECs' ability to enter an ILEC central office to verify claims of space exhaust, and asks the Commission to develop rules that will prevent the establishment of unreasonable charges. Finally, the Commission should ensure that CLECs have the right to hire independent contractors to install and maintain equipment in virtual collocation arrangements.

The Commission should also establish a broad definition of "unbundled local loop" and take other action to ensure its availability for the provision of advanced services. The Commission should define the enhanced extended link as a single unbundled network element. It must also require ILECs to provide full access to databases identifying DSL-capable loops, and should set a standard set of definitions for such loops. Intermedia proposes two options by which ILECs may provision unbundled loops from integrated digital loop carrier systems, and

asks the Commission to clarify that subloop unbundling and interconnection is technically feasible and subject to § 251(c) of the Act.

The Commission is correct in concluding that advanced services sold to end users must be made available for resale at wholesale rates. This decision should also be extended to access services provided to end users.

The Commission should find that ILECs may not restrict a CLEC's right to use UNEs to provide any service, be it local, access or advanced. Finally, there is no need or justification for providing Bell operating companies with interLATA relief for advanced services at this time.

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In the Matter of	)	
Deployment of Wireline Services Offering	)	
Advanced Telecommunications Capability	)	CC Docket No. 98-147

INITIAL COMMENTS OF INTERMEDIA COMMUNICATIONS INC.

Intermedia Communications Inc. ("Intermedia"), by its undersigned counsel, and pursuant to the Commission's Notice of Proposed Rulemaking ("*NPRM*") in the above captioned docketed proceeding,[1] respectfully submits its Initial Comments regarding actions the Commission should take to promote the deployment of advanced telecommunications capability to the American public.

I. INTRODUCTION

Intermedia is the largest independent facilities-based competitive local exchange carrier ("CLEC") in the nation, and provides a full range of telecommunications services nationwide. Intermedia maintains one of the most sophisticated digital networks in the country, composed of over 150 data switches, 20 voice switches and over 35,000 miles of optical fiber. Intermedia's data switches and high-capacity transport provide numerous advanced services such as asynchronous transfer mode ("ATM"), frame relay, integrated services digital network

[1] *Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, CC Docket No. 98-147, FCC 98-188 (rel. Aug. 7, 1998) ("*NPRM*").

("ISDN"), and Internet access. In 1994, Intermedia founded the UniSPAN© consortium with three other carriers, through which Intermedia provides end-to-end frame relay service throughout the United States and Canada. Intermedia also currently provides frame relay service to five Central and South American countries through frame relay operating agreements with several South American carriers, and Intermedia plans to expand this area of its service considerably over the coming year.

In July 1997, Intermedia acquired DIGEX, one of the country's largest Internet service providers ("ISPs"). DIGEX is a first-tier, national Internet carrier that operates high-capacity digital networks across the country. The acquisition of DIGEX both complemented and expanded Intermedia's national digital network. As a result of these developments, Intermedia operates one of the largest digital networks in the country.

As a carrier that is heavily focused on packet-based networks to provide both data and voice services, Intermedia applauds the Commission's initiation of the instant proceeding. The scope of the issues raised by the Commission in its *NPRM*, and the tentative conclusions that the Commission has proposed make clear that the Commission has heard the arguments raised by the CLEC industry, and understands that additional regulatory steps must be taken to fully implement the procompetitive provisions of §§ 251, 252, 271 and 272 of the Communications Act, and to fulfill the Commission's mandate to promote the deployment of advanced services and facilities pursuant to § 706. As an active party in numerous state regulatory proceedings that are developing rules and policies governing the interconnection of incumbent local exchange carriers ("ILECs") and CLEC networks, Intermedia has had the opportunity to participate in the

development of a number of state regulatory initiatives that are proving highly effective in achieving these goals. This recent experience provides the basis for many of the rules and policies that Intermedia proposes below.

Finally, Intermedia notes that the orders that the Commission issued in conjunction with the *NPRM* have already proven invaluable to the competitive local service industry. The Commission's express finding that advanced services provided by ILECs are fully subject to the interconnection, unbundling and resale provisions of § 251(c) of the Act[2] has obviated the need for CLECs to litigate this issue before state regulators, and has saved the industry substantial expenditures of money, time and personnel resources. Intermedia is grateful for the Commission's action on issues of critical importance to the CLEC industry to date, and for the Commission's commitment to continue to craft procompetitive policies and regulations governing the interconnection of competitive and incumbent carrier networks in the instant proceeding. Below, Intermedia provides its responses to the questions raised and tentative conclusions issued in the *NPRM* and makes a number of its own recommendations on policies and rules that the Commission should adopt.

II. THE COMMISSION SHOULD ADOPT AN EXPANSIVE DEFINITION OF ADVANCED TELECOMMUNICATIONS CAPABILITY

In its *NPRM*, the Commission proposes to define "advanced services" as "wireline, broadband services, such as services that rely on digital subscriber line technology

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2 *NPRM*, at ¶¶ 32, 45, 52-53, 57-58, 60-61.

(commonly referred to as xDSL) and packet-switched technology."[3] Intermedia generally supports this definition of "advanced services" for purposes of implementing § 706.[4] In particular, the Commission's decision to include expressly DSL and packet switched technologies within this definition is critically important to the continued development of advanced services and competitive digital networks. Indeed, the Public Switched Telephone Network as it has traditionally been known is evolving into an all-digital network that will increasingly use high capacity transport and packet-switching technology to provide data services, Internet access and service, video, messaging and traditional telephony seamlessly over a series of interconnected digital networks operated by incumbent and competitive carriers. As one commentator describes this evolution: "Though they can readily travel over the same networks, video, data and voice present different demands from an engineering perspective. . . . Broadband networks and fast packet switches transcend all these differences. Once networks can send data packets quickly enough, voice, data and video will move side by side."[5]

Intermedia differs with the Commission's proposed definition in one critical respect, however. Specifically, Intermedia asks that the Commission not limit its definition of advanced services to those provisioned over wireline technologies. There are several reasons

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3 *NPRM* at ¶ 3.

4 In its Comments in the Commission's § 706 Notice of Inquiry in CC Docket No. 98-146, Intermedia has urged the Commission to adopt a broad, technology-neutral definition of "broadband" in its definition of advanced services and facilities. In particular, Intermedia asks the Commission to define broadband facilities as those capable of providing more than a single voice grade service, regardless of the technology used. Comments of Intermedia Communications Inc., filed in CC Docket No. 98-146 on Sept. 14, 1998, at 3.

5 P. Huber, *Law and Disorder in Cyberspace* 109-10 (1997).

why this definition should be expanded to include wireless as well as wireline technologies. First, § 706 of the Act expressly defines advanced telecommunications capability "without regard to any transmission media or technology."[6] In fact, the Commission acknowledged this provision of the Act in the *NPRM*, where it stated that "Congress made clear that the 1996 Act is technology neutral and is designed to ensure competition in all telecommunications markets."[7]

Second, in the near future, the traditional distinctions in the types of services that wireless and wireline technologies deliver will disappear. As one commentor explains:

> By early in the next century, a third of all video traffic will move on media other than cable, and a third of all data traffic will move on media other than telephone lines. Other wire and wireless technologies will supply access to the Internet and e-mail. . . . Five or six direct broadcast satellites (DBS) will use digital technology to supply one-way video and they will also provide data services by closing the loop over telephone lines.[8]

Similarly, it is likely that wireless and wireline technologies will increasingly be used within the same network to provision different legs of the same service. In such an environment, a single carrier may establish a network that deploys both wireline and wireless components, and carriers that have predominantly wireless networks will increasingly interconnect with predominantly wireline network operators. To the extent that the Commission will use this proceeding to craft rules and policies that make interconnection less costly and restrictive, these rules and policies should be available to all carriers.

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6 47 U.S.C. Tit. VII, § 706(c)(1) (1996).

7 *NPRM* at ¶ 11.

8 P. Huber, *Law and Disorder in Cyberspace* 110 (1997).

Finally, the Commission must be careful to avoid establishing regulatory incentives or disincentives that may encourage carriers to make network decisions that may not be technologically or economically efficient. For example, if the Commission establishes policies only to promote the provision of advanced telecommunications capabilities only over wireline services, such a decision may compel ILECs to deploy wireline technology in low density, high cost areas, where wireless technology may provide a more efficient solution. Similarly, if wireless carriers cannot obtain interconnection with incumbent wireline carriers as easily as wireline carriers can, such a policy may disincent the provision of advanced services over wireless technology, even in areas of the country where it is the most cost-effective means of doing so. For all these reasons, Intermedia urges the Commission to revisit its definition of advanced services and technologies for purposes of § 706 to include services provided over any technology.

III. THE COMMISSION'S SEPARATE AFFILIATE RULES MUST BE ADEQUATE TO IDENTIFY AND PREVENT ANTICOMPETITIVE BEHAVIOR

Intermedia cautiously supports the Commission's tentative conclusion that ILECs should be able to establish structurally separate advanced services affiliates that will be deemed nondominant and will not be subject to the most stringent interconnection provisions of § 251(c) of the Act.[9] Of course, as the Commission has noted, providing such regulatory relief for ILEC

[9] *NPRM* at ¶¶ 86, 92

affiliates is only possible if regulatory safeguards are in place that are thorough, enforceable and enforced in a manner that demonstrably prevents anticompetitive behavior. The Commission has correctly acknowledged the considerable risk of discriminatory and anticompetitive behavior that accompanies such an affiliate arrangement, and Intermedia commends the considerable effort that the Commission has undertaken in proposing structural separations and affiliate transaction rules designed to eliminate such behavior. Nevertheless, as Intermedia discusses at length below, substantial modifications are necessary if the Commissions' rules are to be effective in preventing anticompetitive behavior.

A. State Regulatory Considerations And The Need For Strong Enforcement At The Federal Level

In addition to these specifics, it is important to note that many state regulatory commissions do not have authority to regulate the activities of an ILEC's affiliates or subsidiaries. For example, the Texas Public Utilities Commission's ("TXPUC's") authority is expressly limited by statute to merely accessing the records of Southwestern Bell Telephone Company's ("SWBT's") unregulated subsidiaries; the TXPUC jurisdiction allows it to do nothing more than disallow associated affiliate expenses in SWBT's rate-making proceedings.[10] Similarly, in comments submitted in the 706 Notice of Inquiry proceeding in CC Docket No. 98-146, the Coalition of Utah Independent Internet Service Providers reported that by statute, the

[10] *See* TEX. UTILITIES CODE ANN. §§ 14.003, 14.154, 53.058 (1998).

Utah Public Service Commission is prohibited from regulating the provision of "new" telecommunications services by U S WEST or its affiliates or subsidiaries.[11]

These examples make it clear that, while the Commission should consider adopting rules and policies established by state regulators, it cannot rely on state regulators in all cases to provide adequate oversight of ILEC/affiliate organizational structures and transactions. As a result, the Commission must ensure that adequate enforcement mechanisms are in place to address violations of the rules it adopts. Specifically, Intermedia requests that the Commission take the following action:

- establish that the "rocket docket" complaint process will be made available to hear complaints involving alleged violations of the Commissions' separate affiliate rules
- specify that affiliates found to be obtaining services from the ILEC on a preferential basis will be prohibited from offering new services for a period of at least six months
- specify that, for ILECs that use services or facilities from affiliates to provide advanced services, violation of the separate affiliate rules will result in a suspension of providing new advanced services for a period of at least six months
- impose fines that will automatically apply upon a finding of violation of the affiliate rules

B. Intermedia Supports The Commission's Proposed Rules, With Certain Modifications

Intermedia generally supports the Commission's proposed rules governing the structure of the separate data affiliate, and some affiliate transactions, although Intermedia urges the Commission to strengthen some of its proposed rules. By themselves, these rules are

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[11] *Comments of the Coalition of Utah Independent Internet Service Providers*, filed in CC Docket No. 98-146 on Sept. 14, 1998, at 5-6.

inadequate to prevent anticompetitive conduct because they focus exclusively on transactions in which the affiliate purchases services or facilities from the parent. It is imperative that the Commission also scrutinize instances in which the ILEC purchases services or facilities from its affiliate. Intermedia discusses these issues in detail below.

1. The Commission's Proposed Rules And Tentative Conclusions

The seven proposed structural separations and nondiscrimination provisions.

Intermedia generally supports the Commission's seven proposed requirements for defining an ILEC separate affiliate,[12] although they must be more specific in order to promote certainty and restrict anticompetitive conduct. Intermedia strongly supports the Commission's conclusion that, in order to operate independently from the ILEC, the affiliate may not own switching equipment, land or buildings in common with the ILEC, and that the ILEC may not perform installation, maintenance or operations for the affiliate outside of standard practices established in tariffs or published interconnection agreements.[13]

Intermedia also supports the Commission's conclusion that all transactions between ILEC and affiliate must be at arm's length, nondiscriminatory, and in writing. To the extent that the affiliate purchases access services or collocation from the ILEC, these services must be provided pursuant to tariff or published interconnection agreement. To the extent that

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12 *NPRM* at ¶ 96.

13 Intermedia opposes any Commission rule that would permit an ILEC advanced services affiliate to enter virtual collocation arrangements with its ILEC parent. In virtual collocation arrangements, the ILEC maintains control of the collocator's equipment. In the ILEC affiliate context, the degree of control would effectively eviscerate the Commission's structural separation and nondiscrimination provisions, and thus, virtual collocation for ILEC data subsidiaries should be prohibited.

the affiliate purchases services or facilities that are not tariffed or included in a published interconnection agreement, any separate contracts must be disclosed, published in tariffs or on websites, and available for public inspection.

Moreover, the Commission must clarify that these publication requirements apply both to Title II telecommunications services and to non-telecommunications services. In particular, to the extent that an ILEC provides its affiliate with non-telecommunications services (such as inside wire maintenance, network construction, building space rental, and other non-telecommunications services), these also must be provided pursuant to contracts that are available for public inspection and these services must be provided to CLECs on identical rates, terms and conditions. For these contracts to be reasonably available to interested parties, ILECs should be required to file such contracts in a tariff on file with the Commission or to maintain them in a website on the ILEC's home page. As Intermedia discusses in subsection 2 below, the Commission's proposed rules have one major shortcoming, in that they do not address cases in which an ILEC purchases advanced services or facilities from its affiliate. As Intermedia discusses below, contracts governing such transactions must also be publicly disclosed.

In addition, the Commission correctly concludes that ILECs may not extend credit to their affiliates. As part of this restriction, the Commission should expressly find that affiliates may not place orders for network equipment through the ILEC, even if they pay for it separately. Such an arrangement would allow the affiliate unreasonably to benefit from volume discounts

that reflect the ILEC's purchasing power. Finally, Intermedia supports the Commission's call for separate officers, directors and employees.[14]

The impact of transfers of network facilities. Intermedia agrees with the Commission's classification of an "affiliate" as an entity that truly operates independently from the ILEC, and an "assign" as an entity that effectively "occupies a position in the exchange market" similar to the ILEC.[15] For this distinction to have meaning, the ILEC must be prohibited from transferring essential network facilities to its affiliate. Intermedia strongly supports the Commission's tentative conclusion to prohibit transfers of local loops to the affiliate.[16] Transfer of such a critical network component would result in the affiliate assuming the role of the ILEC, and would render the company an assign. The same analysis applies to the transfer of subloop components, such as controlled environmental vaults and other remote terminals.

This analysis also applies to other critical components of the ILEC networks, and Intermedia supports the Commissions' tentative conclusion that a transfer of a central office[17] would render the company an assign. The Commission should expand on this conclusion, however, and ensure that any functionality currently provided by an ILEC out of a central office – including DSL multiplexing – must remain a central office functionality and may not be removed from the central office by means of a transfer to an affiliate. Such a finding is critical if CLECs are to retain the ability to obtain unbundled loops from systems using Digital Loop

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14 *NPRM* at ¶ 88.

15 *NPRM* at ¶¶ 90-91.

16 *See NPRM* at ¶ 113.

17 *NPRM* at ¶ 107.

Carrier technology, or new unbundled network elements, such as Enhanced Extended Links ("EELs"). These elements are discussed in detail in Section V, below.

These same concerns compel Intermedia to take issue with the Commission's tentative conclusion that transfers of advanced facilities should be exempted from the Commission's nondiscrimination rules for a limited period.[18] Intermedia is concerned that such an exemption would promote extensive spinoffs of existing ILEC facilities, which could severely disrupt existing interconnection agreements. For the same reason, Intermedia agrees with the Commission's tentative conclusion that "wholesale" transfers of advanced facilities should be prohibited.[19]

The impact of other kinds of transfers from ILEC to affiliate. Other kinds of transfers between ILEC and affiliate should also be strictly regulated.[20] As discussed in more detail below, affiliates should be prohibited from branding their services with the ILEC's name, and joint marketing by parent and affiliate should be disallowed. Fund transfers and transfers of CPNI between ILEC and affiliate should similarly be strictly prohibited.

Collocation of the affiliate with the ILEC must be nondiscriminatory. Intermedia strongly supports the Commission's tentative conclusion that, upon transfer of an asset that has already been installed in an ILEC central office, the affiliate should be required to remove the asset unless the office has space available for collocation of CLEC equipment.[21] This position

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18 *See NPRM* at ¶¶ 111-112.

19 *See NPRM* at ¶ 106.

20 *See NPRM* at ¶ 113.

21 *NPRM* at ¶ 110.

strikes a reasonable balance between efficiency for the affiliate and competitive protections for CLECs. In cases where collocation is available to CLECs, it is reasonable to spare the affiliate the cost of removing already-installed equipment.

Such arrangements should also help to define how CLECs may collocate with ILECs. For example, many ILECs take the position that, under either virtual or physical collocation, CLEC equipment may only be collocated in a discrete portion of the central office that is reserved for CLECs, and that CLEC equipment may not be commingled with ILEC network equipment. If, however, the ILEC affiliate maintains equipment that is collocated outside CLEC-designated space within the ILEC central office – say in proximity to the ILEC main distribution frame – the Commission should find that it is presumptively reasonable and technically feasible for CLECs to collocate their equipment in the same manner. Failure to accord such equal treatment to CLECs would violate the Communications Act's prohibitions against unreasonable discrimination.

Structural separations rules should apply to small independent ILECs.[22] While it is unlikely that small, independent ILECs will receive large volumes of requests for interconnection in the near future, many are beginning to deploy advanced technologies and roll out advanced services. In some cases, competitive carriers are compelled to seek such interconnection with such independents. In particular, when independents serve areas that abut Tier 1 ILEC extended service area territories, or areas that are part of the same communities of interest served by a Tier 1 ILEC, a CLEC must obtain interconnection with the independents in

22 See *NPRM* at ¶ 98.

order to provide coverage in the CLEC's selected service area. For this reason, the Commission's rules governing advanced service affiliates – as well as the other interconnection rules that will result from this proceeding -- must apply to smaller ILECs as well as the Tier 1 carriers.

The separate affiliate rules should not sunset.[23] As the Commission has noted, it was prompted to propose rules governing the relationship between ILECs and advanced service affiliates out of a concern that ILECs have the incentive and opportunity to engage in self-dealing, and unreasonably discriminatory conduct in order to obtain a competitive advantage in local service markets. This incentive and ability will exist as long as the ILEC remains dominant in those markets. If and when the Commission finds ILECs to be nondominant in their local markets, the Commission will eliminate many of its regulations, as it has in the interexchange services market. At such time, the Commission may decide to eliminate the affiliate structure and transaction rules. Prior to the time the Commission may make such a determination, however, there is no basis for terminating these rules. The establishment of a sunset date would constitute an arbitrary and capricious termination of essential competitive safeguards.

The Commission must put enforcement "teeth" into the rules. As Intermedia notes in the previous section, it is imperative that the Commission assure compliance with the rules it is devising to protect CLECs against anticompetitive conduct between ILECs and their affiliates. To do so, the Commission should make clear that violations of the affiliate structure

23 *See NPRM* at ¶¶ 98-99.

and transaction rules will be met with a substantial fine, as well as an award of damages to any CLEC that has been harmed by such violations.

This application of substantial fines for violations of affiliate transaction rules has substantial historical precedent. When the Commission found compelling evidence that New York Telephone paid excessive amounts for equipment and materials it purchased from its subsidiary Materiel Enterprises Co. ("MECO"), it issued a notice of apparent liability that proposed to impose forfeitures of $709,500 each on New York Telephone and New England Telephone for "failure to keep their regulated books of account in the manner prescribed by the Commission. . . ."[24] That case did not end in a final ruling by the Commission, but instead was settled when the Commission adopted a consent decree affecting the NYNEX companies. That decree, in addition to requiring the NYNEX companies to reduce their interstate rates and capital accounts by the amounts of the alleged overcharges, called for the NYNEX companies to make a combined "voluntary contribution" of $1.419 million to the United States Treasury.[25]

Because direct harm to CLECs from violation of affiliate transaction rules may be impossible to define with specificity, reliance on a forfeiture of a magnitude of the *MECO* case is appropriate and reasonable. For this reason, the Commission should make clear that it will treat violations of the separate affiliate structure and transaction rules that it may adopt in this proceeding in a manner consistent with these past decisions.

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24 *New York Telephone Co.*, 5 FCC Rcd. 866 (1990) ("*MECO* case").

25 News Release, *FCC Adopts NYNEX Consent Decree*, Report No. CC-380, dated Oct. 4, 1990.

2. In Addition To The Proposed Rules, It Is Imperative That The Commission Scrutinize Purchases From The Affiliate By The ILEC

The Commission's proposed rules regarding affiliate structure and transfers suffer from one fundamental flaw – they regulate only "one-way" transfers in which the affiliate purchases services or facilities from the ILEC. Yet Commission precedent and Intermedia's recent experience make clear that transfers in which the ILEC purchases goods or services from the affiliate must equally be subject to scrutiny. First, as discussed above, the Commission's experience with NYNEX's MECO subsidiary illustrates how an ILEC may benefit from paying excessive charges for services or materials it purchases from its subsidiary. In such a case, the subsidiary benefits by collecting above-market rates, while the ILEC simply adjusts its Price Cap calculations to reflect a higher cost of doing business.

In addition to allowing the ILEC and the affiliate to realize above-market earnings, when such a transaction involves critical network inputs, they can have a directly anticompetitive impact on competitive carriers. For example, assume an ILEC affiliate owns some equipment that provides an essential functionality for an advanced service. Assume further that the ILEC purchases that functionality for its own advanced services, and that access to the same functionality is also necessary for a CLEC that seeks to provide a competitive advanced service. If the affiliate charges excessive rates for such input, it not only allows itself and the ILEC to realize supracompetitive profits on their services, it effectively prevents the CLEC from competing by imposing excessive rates for an essential input.

This is precisely the problem that Intermedia encountered when it attempted to interconnect with Ameritech two years ago. Intermedia sought to interconnect its advanced

frame relay network with Ameritech's frame relay network. As with traditional telephone services, such interconnection was necessary if Intermedia hoped to be able to deliver its frame relay traffic to customers located on Ameritech's frame relay network. When Intermedia pursued the interconnection arrangement, it learned that all of Ameritech's frame relay switches were owned by its advanced services affiliate, Ameritech Advanced Data Services ("AADS"). Both Ameritech and AADS provided their own frame relay services – Ameritech purchased the frame relay switching functionality from AADS and resold it in providing the Ameritech frame relay service; and AADS purchased transport from Ameritech and resold it in providing the AADS frame relay service.

This parent/affiliate relationship initially made it impossible for Intermedia to interconnect with Ameritech. As a result, Intermedia initiated arbitration in Illinois[26], Ohio[27] and Indiana[28] over this matter, and in those proceedings, Ameritech elaborated its rationale for refusing Intermedia interconnection: 1) Ameritech was able to argue that the affiliate structure insulated the parent company from complying with the provisions of 251(c), 2) the affiliate structure imposed excessive frame relay switching costs on Intermedia, and 3) the affiliate

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26 *Intermedia Communications Inc. and Illinois Bell Telephone Company ("Ameritech Illinois"), Illinois Commerce Commission*, Docket No. 97-AB-002 ("*Illinois Arbitration Proceeding*")

27 *In the Matter of the Petition of Intermedia Communications, Inc. for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Ameritech Ohio,* Public Utilities Commission of Ohio, Case No. 97-285-TP-ARB.

28 *Petition By Intermedia Communications Inc. For Arbitration With Ameritech Indiana Pursuant To The Telecommunications Act of 1996*, Indiana Public Utility Regulatory Commission, Cause No. 40787-INT-01.

structure imposed excessive transport costs on Intermedia. Intermedia addresses these three issues seriatim.

First, Ameritech argued that, because AADS owned the frame relay switches, Intermedia had to seek interconnection with AADS, not Ameritech. Ameritech further argued that AADS was not subject to the interconnection requirements of § 251(c) of the Communications Act. Under the Commission's proposed rules, this situation would not arise again, because AADS would be classified as an assign, not an affiliate, and the Commission has proposed that assigns will be fully subject to § 251(c). Nevertheless, if AADS were correctly structure as an advanced data affiliate, this would be a legitimate defense for an ILEC seeking to avoid advanced service interconnection.

Second, Ameritech argued that, if it were to interconnect with Intermedia, it would simply pass along to Intermedia whatever amount it paid to its AADS subsidiary for use of the AADS frame relay switching. Ameritech contended that this practice fully complied with the interconnection pricing principles established by § 252(d) of the Act, because the price that Ameritech paid to AADS was Ameritech's direct cost of obtaining the service. This argument, of course, is intended to insulate the ILEC from cost and rate scrutiny by a state commission.

Third, Ameritech initially argued that, because the frame relay switches were not located in Ameritech central offices, but rather were located in a separate, centralized location in an AADS office, any interconnection with Ameritech would require that Intermedia pay transport charges for hauling the traffic from the ILEC office where Intermedia was collocated to the location of the AADS switch. Of course, such backhaul for Ameritech added virtually no